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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 718

EDWARD F. GOLTRA, PETITIONER

vs.

DWIGHT F. DAVIS, SECRETARY OF WAR OF THE United States, Successor to John W. Weeks, Secretary of War of the United States, Col. T. Q. Ashburn, Chief Inland & Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, respondents

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BRIEF OF RESPONDENTS

STATEMENT

On May 28, 1919, the contract in question was entered into. Its general features are set out in petitioner's statement, and it and the bill will be considered more in detail in the argument.

When the boats and barges which were the subject matter of the contract were delivered to Mr. Goltra on July 15, 1922, Mr. Weeks had become Secretary of War, and it became necessary for him as such to deal with this contract, with which,

in the making, he had had no part. Certain stipulations of the contract called for the exercise on his part of judgment and discretion. One in particular has been repeatedly mentioned in the bill of complaint and in the briefs of counsel. It is as follows:

> 2. (a) That the said lessee (Goltra) shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made, provided the Secretary of War consents to such use other than as a common carrier.

From this paragraph, it will be at once seen that the contract imposed upon the lessee the duty of operating the fleet as a common carrier under rates neither higher nor lower than the rail rates, unless the Secretary of War shall have consented to a different rate, or that it be operated other than as a common carrier.

On March 4, 1921, the Secretary of War, at the request of Mr. Goltra, and before the delivery of the fleet to him, authorized operation at 80% of the all-rail rates.

On May 6, 1922, also before the delivery of the fleet to Mr. Goltra, the Secretary of War wrote Mr Goltra withdrawing the 80% rate with respect to future undertakings except as to such commodities as might thereafter be specified by him, but not withdrawing the rate as to undertakings already entered into, which had been mentioned in Mr. Goltra's letter of April 18, 1922.

On May 25, 1922, also before delivery, the Secretary gave permission for the handling at 80% of all-rail rates of the following commodities: liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain above the capacity of the Mississippi-Warrior Service to handle such commodity. This letter gave permission to transport all commodities including grain, above St. Louis at the 80% rate.

After July 15, 1922, when the fleet was delivered to Mr. Goltra, only two small movements of one tow boat and several barges were had, one in August and the other in September, 1922.

It has been already noticed that the contract required the operation of the fleet as a common carrier.

Section 8 of the contract provided that non-compliance, in the judgment of the lessor, with any of the terms or conditions of the contract, would justify his terminating it and returning the fleet to the lessor.

On March 4, 1923, the Secretary served upon Mr. Goltra a notice dated March 3, 1923, terminating the contract for failure to operate the fleet as a common carrier and demanding possession of the fleet.

On March 8, 1923, Mr. Goltra wrote the Secretary, refusing to comply with his demand.

On March 25, 1923, acting under written instructions from the Assistant Secretary of War, Colonel Ashburn took possession of the fleet in the harbor of St. Louis; as we contend, without violence or show of force, but as complainant contends, otherwise. In our view of the law, the issue of this controversy is immaterial.

Colonel Ashburn in executing the executive judgment had the right to use all necessary force just as the Marshal (another executive officer) has such right in executing a judicial judgment.

At one of the preliminary hearings, complainant contended that the right to declare a forfeiture was, under the contract, with the Chief of Engineers, and not with the Secretary of War.

On April 30, 1923, a letter signed by the Chief of Engineers, dated April 27, 1923, declaring a forfeiture in similar terms to the Secretary's letter of March 3, 1923, was served upon Mr. Goltra. This letter was dated and served after the taking of possession of the fleet and after the institution of the suit, but is in the record at page 90, and is before the court. It is the contention of the defendants that the rights and status of the parties are

to be declared as of the date of the order of temporary injunction rather than at the time of the seizure or of the filing of the suit.

Much controversy has arisen between the parties as to who or what is the lessor under the rather vague and inharmonious language of the contract designating him. This, in our view, is of no moment, as it clearly appears that the United States was the owner of the fleet, and the contract was made in its behalf. Furthermore, the judgment of each of the officers whom the parties oppositely contend was vested with discretion to cancel the contract has been exercised to that end.

The defendants at every opportunity have urged that this suit is one the object of which is to specifically enforce a contract against the United States behind its back and is therefore, in effect and consequence, a suit against it; that it seeks to judicially review the exercise of the judgment and discretion of an executive officer, in a matter not merely ministerial, but one with respect to which he is vested with the power and duty to act at his discretion and according to his judgment.

It is the contention of the defendants that neither of these things may be done, and this view the majority opinion of the Court of Appeals sustains.

It is also contended that the bill is essentially one for specific performance of the contract, to which the substantial and only interested party, the United States, is not a party.

SUMMARY OF POINTS AND AUTHORITIES

I

The United States being the owner of the property and a party to the contract, no equitable relief can be had without the United States being a party.

Cunningham v. *Railroad Company,* 109 U. S. 446.

II

The suit is in legal effect a suit against the United States.

Wells v. *Roper,* 246 U. S. 335;
Hagood v. *Southern,* 117 U. S. 52;
In re Ayers, 123 U. S. 443;
Naganab v. *Hitchcock,* 202 U. S. 473;
Minnesota v. *Hitchcock,* 185 U. S. 373;
Stanley v. *Schwalby,* 162 U. S. 255;
Goldberg v. *Daniels,* 231 U. S. 218;
Belknap v. *Schild,* 161 U. S. 11;
New Mexico v. *Lane,* 243 U. S. 52;
Louisiana v. *Garfield,* 211 U. S. 70;
Leather v. *White,* 296 Fed. 477.

III

The suit seeks to interfere with the judgment and discretion of an executive official and to substitute therefor the judicial judgment.

Marbury v. *Madison,* 1 Cranch 170;
Noble v. *Railroad,* 147 U. S. 171;
Wells v. *Roper,* 246 U. S. 335;
U. S. v. *Hitchcock,* 190 U. S. 316.
US v. Eckford 6 Wall. 484
US v. McLemore 4 How 287

IV

The second notice of forfeiture was admissible in evidence.

Clark v. *Wooster,* 119 U. S. 322;
Singer Mfg. Co. v. *Wright,* 141 U. S. 696;
Railroad v. *Trans. Co.,* 155 U. S. 585;
Continental Sec. Co. v. *Transit Co.,* 207 Fed. 467.

V

The nonuse of the property legally justified the forfeiture.

(a) Fraud or bad faith must be shown.

Kihlberg v. *United States,* 97 U. S. 398;
Sweeney v. *United States,* 109 U. S. 618;
Martinsburg & Potomac R. R. Co. v. *March,* 114 U. S. 549;
United States v. *Gleason,* 175 U. S. 588;
United States v. *Mason & Hanger Co.,* 260 U. S. 323;
U. S. v. *Henley,* 182 Fed. 776;
Second Natl. Bank v. *Pan-American Bridge Co.,* 183 Fed. 391.

VI

The Government was acting in its sovereign capacity.

North Am. Com. Co. v. *U. S.,* 171 U. S. 110.

(a) The result would be no different if it were acting otherwise.

U. S. v. *Bank of the Metropolis,* 15 Pet. 392.

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VII

Courts cannot decree specific performance against United States

ARGUMENT

THE MERITS

The bill admits that the plaintiff did not perform his contract in accordance with its terms. Note the following allegation:

> And the plaintiff therefore avers that by the acts of the said John W. Weeks, acting as Secretary of War, and other representatives of the War Department, the plaintiff was wrongfully deprived by the lessor in said contract from carrying out the terms and conditions of said contract as a private carrier or in any other manner provided by said contract; and it became and was impossible for the plaintiff to so carry out the contract under the terms and conditions thereof, unless and until the *lessor* therein, *being the United States,* causes and permits the plaintiff to carry out the conditions of said contract.

What were the acts of the Secretary of War which prevented the performance of the contract? It must be borne in mind that the contract gave to the Secretary the right to compel operation *at all rail rates.* Therefore, if he had done this, it could not be said that he had breached the contract. But he did not do this. Just what did he do? On May 4, 1921, the Secretary gave his consent generally to a rate which was 80% of all rail rates. On May 6, 1922, this general consent was withdrawn as to *future* engagements, and special

application required to be made for rates on specific commodities, followed on May 25, 1922, by expressly specifying an 80% rate on practically everything which the barges could suitably handle, except grain, which was permitted to be carried at this rate, but in limited amount on account of lack of elevator capacity at terminal points and other conditions at New Orleans. A rate of 80% on all commodities was permitted above St. Louis. All this was done before delivery of the boats. No engagements already entered into were affected by those orders. It is to be noted that, notwithstanding all this, none of the hundreds of thousands of barrels of oil which Mr. Goltra says in his letter of April 8, 1922, he had obligated himself to transport were ever moved, and no effort ever made to qualify as a common carrier. This was all the authority the Secretary of War ever exercised over the fleet, and this was the interference and non-cooperation of which the Secretary was guilty, when, by the very stipulation of the contract itself, he could have held the plaintiff, had he wished, to the all rail rates on all commodities. It must always be borne in mind that the operation of the boats was the prime consideration moving to the Government in the making of this contract. Without that, it could receive no payment for them; without that, the transportation service of which they were capable and for which there was such crying need, could not be rendered.

From all of this it follows that, forgetting for the moment the sovereign status of one of the parties to the contract, and looking at them all as individuals only, there is no ground for either legal or equitable relief. Plaintiff solemnly admits in the bill itself nonperformance of his contract. He undertakes to excuse it because the Secretary of War, while authorized to hold him to all rail rates on all commodities, gave him an 80% all rail rate on everything the barges were designed to carry limiting the amount of carriage of only one commodity to the capacity of the warehouses and terminals. Nonperformance being conceded, if the excuse fails, as under the incontrovertible facts it must fail, the plaintiff is the wrongdoer, instead of the aggrieved.

Forgetting again for the moment the fact that the forfeiture was declared by an executive officer in the performance of his duty and that this proceeding did not originate in the Court of Claims, and viewing the situation as though the controversy were between private individuals, in order for the petitioner to maintain his right to a judicial review of the propriety of the declaration of forfeiture, he must show bad faith or fraud.

There are a number of cases holding that where a contract authorizes an officer or agent of one party to make a determination of fact, in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, the determination of the of-

ficer or agent is conclusive. The rule has been applied in the following instances:

(1) In *Kihlberg* v. *United States,* 97 U. S. 398, to a determination of distances by the chief quartermaster of the district of New Mexico under a contract for transportation which provided:

> Transportation to be paid in all cases according to the distance from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the district of New Mexico, and in no case to exceed the distance by the usual and customary route.

(2) In *Sweeney* v. *United States,* 109 U. S. 618, to a refusal of an agent of the United States to give a certificate under a contract which provided that payment for a wall was not to be made until some officer of the army, civil engineer, or other agent, to be designated by the United States, had certified after inspection that it was in all respects as contracted for.

(3) In *Martinsburg & Potomac R. R. Co.* v. *March,* 114 U. S. 549, to the absence of a certificate under a contract for the construction of a railroad which provided that whenever the contract should be completely performed on the part of the contractor, and the company's engineer should so certify, payment should be made. In this case the defendant asked the trial court to charge the jury that the final estimate of the engineer was to be taken as conclusive, unless it appeared from the

evidence that, in respect thereto, he was guilty of fraud or intentional misconduct. The trial court modified this by adding after the words " fraud or intentional misconduct " the words " or gross mistake." The Supreme Court said:

> This modification was well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature, as necessarily implied bad faith upon the part of the engineer.

(4) In *United States* v. *Gleason*, 175 U. S. 588, to a refusal of an engineer in charge of certain work to grant an extension of time within which to perform the work under a contract made by the United States, through an officer of engineers, which provided that if the contractor should be prevented by freshet, ice or other force or violence of the elements from commencing or completing the work, such extension might be granted as in the judgment of the officer who made the contract or his successor should be just and reasonable.

(5) In *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, to a decision of a contracting officer that a premium on a bond was an expenditure in the performance of work under a cost plus contract, for which the contractor should be reimbursed; the contract providing that the contractor should be reimbursed for such of its actual net expenditures in the performance of the work as might be approved or ratified by the contracting officer.

U. S. v. *Henley* (C. C. A. 8th Cir.), 182 Fed. 776, was an action to recover from the United States money conceded to be due. The United States set up a counterclaim for money paid on a certificate of an army officer authorized to supervise the performance of a contract, and whose decision as to performance was made final, alleging that the officer "carelessly, negligently, and wrongfully" permitted the plaintiff to do various things contrary to the contract, and to omit others provided for therein, and approved the work and certified that it had been duly performed, thereby misleading its other officers and agents, and inducing them to accept what had been done and to pay the full contract price. The court held that a demurrer to the counterclaim was properly sustained, since it was not alleged by the United States that the certificate of the officer in charge was the result of fraud or such gross mistake as would imply fraud or a failure to exercise an honest judgment.

In *Second National Bank* v. *Pan-American Bridge Co.* 183 Fed. 391 (C. C. A. 6th Cir.), payment under a contract was to be made on the certificate of an architect. The court held that it was error to instruct the jury that recovery could be had without the certificate if the certificate were withheld "unreasonably and unfairly;" that there must be bad faith to dispense with the necessity for the certificate.

Certainly nothing in this record bespeaks bad faith or fraud.

It will be noted that the above cases in which the United States was a party and in which judicial review was had of actions of ministerial officers originated in the Court of Claims, where legal principles of substantive law applicable as between individuals is to be applied to Government officers. It is our view that this does not militate against the contention hereinafter made that there can be no such judicial review of the exercise of judgment and discretion by such officers within their proper sphere of action in other Courts of the United States than in the Court of Claims, for the reason that the United States has consented to be sued in the Court of Claims, but not elsewhere.

THE SUIT IS AGAINST THE UNITED STATES

Aside from the proposition that on the merits of the bill and on the evidence the complainant is entitled to no equitable or other relief, there arise on his record two questions of so kindred a nature, that they were best argued together.

First, that the suit is in effect and consequence, although not nominally, one against the United States.

Second, that the suit is one to enjoin executive officials of the United States from exercising a right and power within their proper sphere of action, which involve the exercise of judgment and discretion, and to substitute therefor, the judgment and discretion of the Court.

It is contended by the petitioner that this proceeding is simply one to preserve the status created by the contract, or for " maintaining and restoring the private rights and property rights under an executed contract." Just what sort of a proceeding that would be it is difficult to understand. Certain it is that this is an equitable proceeding and not one at law. Certain it is that aside from Mr. Goltra's interest, all of the interest and rights with respect to the property in question are those of the United States and not of the defendant officials. Any adjudication of rights with respect to the property must be against the United States, which is both the owner and the other party to the contract.

The prayer of the bill is a prayer for specific performance of the contract. It asks a restraining order without notice enjoining the defendants from interfering with the possession by the complainant of the boats and barges, commanding them to return those taken and restraining the defendant, Secretary of War, " *from doing any act whatever looking to the cancellation or other termination of said contract,*" concluding with the following:

> The plaintiff prays that on final hearing of this cause of action, a decree may be entered in favor of plaintiff and against the defendants and each of them, *which shall determine the rights of the plaintiff as herein set forth* under said contracts and perpetually enjoin and restrain the said defendants from interfering in any way with said rights.

This is undoubtedly a prayer for specific performance. The preliminary relief is only incidental to the final decree of performance.

Dealing with an equitable proceeding of a similar nature, this Court in *Cunningham* v. *R. R. Co.*, 109 U. S. 446, said:

> In actions of law, of which mandamus is one, where an individual is sued, as for injuries to person or to property, real or personal, or in regard to a duty which he is personally bound to perform, the Government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant, he must show it to the Court and abide the result. In either case the state is not bound by the judgment of the Court, and generally its rights remain unaffected. It is no answer for the defendant to say I am an officer of the Government and acted under its authority, unless he shows the sufficiency of that authority. Courts of equity proceed upon different principles in regard to parties. As was said in *Barney* v. *Baltimore*, 6 Wall. 280, there are persons who are merely formal parties without real interest, and those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject matter of the suit renders them *indispensable* as parties to it. Of this latter class the Court said, in *Shields* v. *Barrow*, 17 How. 130:

> "They are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."
>
> "In such case," says the Court in *Barney v. Baltimore*, 6 Wall. 280, "the Court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."
>
> *In the case now under consideration, the State of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter, or any official authority to grant the relief asked.*

On this authority, the presence of the United States is indispensable to final relief. For this reason alone, the suit must fail.

A suit to specifically perform a contract of the United States brought against its officers is a suit against it, and this bill is in legal effect one to specifically enforce the contract set forth therein, and to restrain the exercise by the opposite party, the United States, from exercising the contractual right to terminate the contract for complainant's failure to perform the very service primarily contemplated by the contract of lease on the ground that the conditions justifying its termination did not exist, inasmuch as the lessee's failure to per-

form was occasioned by alleged acts of noncooperation or frustration on the part of the United States. In other words, the bill proceeds upon the theory not that the *right* to declare the contract terminated did not exist at all, but that a state of facts from which the right might arise did not exist, as had been so determined by the Secretary of War, thereby challenging the soundness and propriety of the conclusions of the Secretary of War in the exercise of his discretion and judgment upon questions of fact. The final decree, if one should be passed in this cause, would be to declare the right of plaintiff to the avails of the contract; that is, the possession and the right to operate the boats, and to restrain the defendants on behalf of the United States from declaring a forfeiture of said contract and retaking possession of the boats, as provided by the terms of the contract. Such an adjudication would clearly involve a determination of both questions of law and fact which vitally affect the rights and property of the United States and which could not be determined without the presence of the United States as a party defendant.

In *Hagood* v. *Southern,* 117 U. S. 52, the State of South Carolina issued bonds which provided that they should be receivable in payment of taxes. It was also provided in the act authorizing the issuance of these bonds that an annual tax of three mills for every dollar of taxable property should be levied to secure the redemption of such bonds.

Subsequently, the state repealed the act for the levy of a tax of three mills for the redemption of such bonds and enacted a statute providing that such bonds should not be receivable in payment of taxes. The plaintiffs as owners of these bonds thereupon instituted suit against defendants as officials of the state to compel them to levy the three-mill tax for the redemption of these bonds and to accept the same in payment of taxes. The Court held that the suit could not be maintained because it was, in effect, a suit against the State of South Carolina, which had not given its consent to be sued.

The Court said (l. c. 67):

> These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses, and, except with that consent, it could not be brought before the Court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and

> agents of the state, having no personal interest in the subject matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States.

And in *In re Ayers,* 123 U. S. 443, the Court, in holding that a suit brought by the holders of certain bonds issued by the State of Virginia, which provided that the coupons thereto would be accepted in payment of taxes, to enjoin the Attorney General and other officials of that state from instituting suits to enforce the collection of taxes against plaintiff, who had tendered such coupons in payment of the taxes, was a suit against the State of Virginia and could not be maintained, said:

> A bill in equity for the specific performance of contract against the state by name, it is admitted, could not be brought. In *Hagood* v. *Southern,* 117 U. S. 52, it was decided that in such a bill, where the state was not nominally a party to the record, brought against its officers and agents, having no

personal interest in the subject matter of the suit, and defending only as representing the state, where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state," the Court was without jurisdiction, because it was a suit against the state.

The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the state. In such a case, though the state be not nominally a party to the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the state.

In *Naganab* v. *Hitchcock,* 202 U. S. 473, the plaintiff, a member of the Chippewa Indian Tribe, brought suit to enjoin the defendant Hitchcock, Secretary of the Interior, from carrying out the provisions of an act for the disposition of certain pine lands ceded by the Indians of Minnesota to the United States, to be administered for their benefit. The Court held that as the title to the lands in question was in the United States the suit was

against the United States, which could not be sued without its consent. The Court said:

> In this case, as in the *Oregon case* (202 U. S. 60), the legal title to all the tracts of land in question is still in the Government, and the United States, the real party in interest herein, has not waived in any manner or consented to be sued concerning the lands in question, and there is no act of Congress in anywise authorizing this action. Upon the authority of the *Oregon case* we hold that there is no jurisdiction to maintain the present suit * * *.

And under a similar state of facts the Court in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387, said:

> Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the state. If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

In *Stanley* v. *Schwalby*, 162 U. S. 255, the plaintiff brought an action in trespass to try title to certain land occupied by the defendants as officers of the United States. The record title to the property in question was in the United States in fee simple. The plaintiff claimed title to an undivided one-third of this land by virtue of a prior unrecorded deed from the original owner, of which he claimed the United States had knowledge when it purchased the property. The Court held that as the record title to this land was in the United States the suit, although nominally against the officials of the United States, was in reality against the United States, and could not be maintained without its consent. The Court said:

> The judgments of the courts of the State of Texas appear to have been largely based on *United States* v. *Lee* (106 U. S. 196), above cited. In that case, an action of ejectment was brought in the Circuit Court of the United States against officers occupying in behalf of the United States lands used for a military station and a national cemetery. The Attorney General filed a suggestion of these facts and insisted that the Court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession, and the United States proved no valid title. The Court held that the officers were trespassers and liable to the action, and therefore affirmed the judgment below, which, as appears by the record

> of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this Court directly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as defendant, except by virtue of an express act of Congress, and that the United States would not be bound or concluded by the judgment against their officers (106 U. S. 199, 206, 222) * * *.
>
> In the case at bar, the United States, and their officers in their behalf, claimed title in the whole land. The plaintiffs claimed title in one undivided third part only * * *. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole jointly with the individual defendants, was directly against the United States and against their property, and not merely against their officers.

In *Goldberg* v. *Daniels,* 231 U. S. 218, the cruiser *Boston,* belonging to the United States, had been condemned and advertised for sale by the Secretary of the Navy to the highest bidder. The plaintiff, claiming to be the biggest bidder for this boat, brought suit to compel the defendant, as Secretary of the Navy, to deliver the boat to him. The Court held that as the boat in question was the property

of the United States the suit was against the United States and could not be maintained because the United States had not consented to be sued. The Court said:

> The United States is the owner in possession of the vessel. It can not be interfered with behind its back, and as it can not be made a party this suit must fail. (*Belknap* v. *Schild,* 161 U. S. 10; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 606; *Oregon* v. *Hitchcock,* 202 U. S. 473, 476.)

In *Belknap* v. *Schild,* 161 U. S. 11, the plaintiff, as the owner of a patent for a caisson gate, brought suit against the defendants, officials of the United States, to enjoin them from using a caisson gate located in a navy yard belonging to the United States and for damages on the ground that the gate in question was an infringement of plaintiff's patent. The Court held that in so far as the defendants had themselves infringed plaintiff's patent rights the suit was not against the United States, but against the defendants personally. It was held, however, that as the gate in question was the property of the United States the suit, in so far as it sought to enjoin the use of said gate by the defendant officers, was a suit against the United States and could not be maintained. The Court said:

> In the present case the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in

place by the United States, and was the property of the United States and held and used by the United States for the public benefit. If the gate was made in infringement of plaintiff's patent, that did not prevent the title to the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to plaintiff was the interest of the United States in property of which the United States had both the title and possession; the United States were the only real party against whom alone in fact the relief was asked and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity and in the exercise of their official functions as represenatives of the United States and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare, and, therefore, the United States were an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the

relief sought, and the suit could not be maintained without violating the principles affirmed in the long series of decisions of the Court above cited.

In *New Mexico* v. *Lane,* 243 U. S. 52, it was held that the State of New Mexico could not maintain a bill against the Secretary of the Interior and the Commissioner of the General Land Office to establish the state's asserted title in fee simple to certain lands, under the School Land Grant Act of June 21 ,1908, and to restrain the Interior Department from disposing of such lands, when there is a question involved as to whether that statute constituted a grant of the lands in question, as this involved a question upon which the United States would have to be heard.

In *Louisiana* v. *Garfield,* 211 U. S. 70, it was held that a suit by the State of Louisiana against the Secretary of the Interior and the Commissioner of the General Land Office to establish its title under the Swamp Land Grant Act of March 2, 1849, to certain lands which were approved to the state by the Secretary of the Interior upon the manifest mistake of law that upon the abandonment of a military reservation, of which the lands formed a part, the lands fell within the terms of the grant, was a suit against the United States because it involved questions of both law and fact upon which the United States would have to be heard.

In *Leather* v. *White*, 296 Fed. 477 (C. C. A. 7th Cir.), the plaintiffs, as minority stockholders of a corporation known as the Speedway Park Association, brought suit to recover certain property of the corporation, which was alleged to have been misappropriated by the majority stockholders and transferred to the United States. One of the defendants, White, was in charge of the property as the representative of the United States. The Court held that the United States was an indispensable party to the suit, and that as it had not consented to be sued the bill must be dismissed. The Court said:

> In view of the relief sought, the recovery of the land, the United States was an indispensable party. (*George* v. *Hart* (D. C.), 250 Fed. 802, *Belknap* v. *Schild*, 161 U. S. 10; *Cunningham* v. *Macon, etc., Ry. Co.*, 109 U. S. 446.) Without its consent, the United States could not be sued in such an action. (*Louisiana* v. *McAdoo*, 234 U. S. 627.) Where the real party in interest, an indispensable party, can not be brought before the Court, the bill must be dismissed.

The fact that the title to the boats and barges which are the subject of this controversy is in the United States establishes beyond question, under the foregoing decisions, that the United States is a necessary and indispensable party to this suit.

Furthermore, the contract which is the basis of this action expressly reserved to the United States,

as the lessor of these boats and barges, the right to cancel the contract and retake these boats in the event of plaintiff's failure to comply with the requirements of the contract on his part to be performed. One of those requirements was that the plaintiff should operate as a common carrier. This, in the judgment of the United States, acting through its duly authorized officers, the Secretary of War and the Chief of Engineers of the United States Army, the plaintiff failed to do, and, accordingly, the United States, acting through those officers, notified plaintiff of the cancellation of said contract and demanded the return of said boats and barges. If the contract was rightfully terminated for plaintiff's failure to comply with its requirements in this respect, then it is or must be conceded that plaintiff was not thereafter entitled to retain them. It may be stated in this connection that the complainant introduced no testimony at the hearing of the application for a temporary injunction that he had complied with the requirements of the contract in this respect. On the contrary, it was established by the testimony of plaintiff's own witnesses at that hearing that during the period intervening between the time that plaintiff acquired possession of these boats and barges, July 15, 1922, and the institution of this suit, March 25, 1923, the plaintiff had only engaged in two operations; the first, a trip from Caseyville, Kentucky, to Crystal City, Missouri, involving the transpor-

tation of 4,000 tons of coal, and the other, from Hannibal, Missouri, to St. Louis, Missouri, involving the transportation of 4,000 tons of coal. (R. p. 70.) It would seem, upon such a showing, that the court below should have denied, instead of having granted, the temporary injunction.

Be that as it may, however, it is our insistence that the United States, acting through its duly authorized officials, had the sole and exclusive right to determine whether or not the complainant had complied with the requirements of the contract in this respect, and the District Court could not substitute its judgment for that of the United States in determining whether or not there had been a compliance with the terms of the contract by the complainant in this regard.

In *Marbury* v. *Madison*, 1 Cranch, 1 c. 170, it is said:

> Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated that any application to a court to control in any respect his conduct should be rejected without hesitation.

In *Noble* v. *Railroad*, 147 U. S. 171, referring to the decision in *Marbury* v. *Madison*, it is said:

> That there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists,

and can exist, no power to control the executive discretion, *however erroneous the exercise may seem to have been*, but with respect to ministerial duties, an act or refusal to act is or may become the subject of review by the courts.

In *Wells* v. *Roper*, 246 U. S. 335, the plaintiff had entered into and embarked upon the performance of a contract with the Post Office Department whereby he agreed to furnish automobiles for a period of four years for use in collecting and delivering the mail at Washington, D. C. Two years before the expiration of the term of this contract, and after plaintiff had expended considerable money and incurred substantial obligations in providing the necessary automobiles and equipment for the performance of this contract on his part, the Post Office Department determined that it would purchase its own automobiles and operate this service for itself. The plaintiff was thereupon notified of the termination of this contract under a clause thereof which provided that the Postmaster General could terminate the contract on ninety days' notice. Suit was instituted by plaintiff to restrain the defendant, First Assistant Postmaster General, from annulling this contract and from interfering with the plaintiff's performance of the same. The Court held that the suit was against the United States and could not be maintained. The case is so like the case at bar that we

deem it appropriate to quote at length from the pertinent expressions of the Court upon the question here under consideration:

> The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual, who, although happening to hold public office, was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do.
>
> That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain.

In dealing with the question of the right of the Court to review the exercise of the judgment and discretion conferred upon the Postmaster General by the contract, with respect to its termination, the Court says:

And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It can not successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it is purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States. (See *Noble* v. *Union River Logging Railroad,* 147 U. S. 165, 171, and cases cited; *Belknap* v. *Schild,* 161 U. S. 10, 17, 18; *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 108; *Philadelphia Co.* v. *Stimpson,* 223 U. S. 605, 620.)

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. Hence, without considering other questions discussed by the courts

below or raised by appellant in this court, we conclude that the dismissal of the bill was not erroneous.

In *Board of Liquidation* v. *McComb*, 92 U. S. 531, it was said:

> A State, without its consent, can not be sued by an individual, and a court can not substitute its own judgment for that of an executive officer in matters belonging to the proper jurisdiction of the latter.

In *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, one Clarke relinquished and deeded to the United States certain forestry lands and in lieu thereof selected certain agricultural lands owned by the Government. After such selection the local registrar certified that there were no adverse claims to the land thus selected in lieu of the land relinquished to the United States. Later, however, the Kern Oil Company protested this selection, and acting upon such protest, the Secretary of the Interior declined to issue letters patent therefor to plaintiff, which had purchased Clarke's interest therein. The plaintiff thereupon applied for a writ of mandamus to compel the defendant, as Secretary of the Interior, to issue letters patent to plaintiff for said land, averring that the protest to such selection by the Kern Oil Company was insufficient to constitute an issue as to whether or not the land so selected by Clarke was open to settlement, and that the recognition of such protest by the defendant was arbitrary and

unjustified. The Court held, however, that it had no power or authority to review the action of the defendant in rejecting Clarke's selection of lands, saying:

> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The Court has no general supervisory power over the officers of the Land Department by which to control their decisions upon questions within their jurisdiction. If this writ were granted, we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. * * * The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

So in this case the Secretary of War having determined that the complainant had failed to operate these boats and barges as a common carrier, as required by the terms of the contract, and having elected to cancel and terminate the contract as a result thereof, his action in so doing is final and

is not subject to review by the courts. This being so, the plaintiff was not entitled to the possession of these boats following such cancellation and the defendants were rightfully entitled to retake the same. Suppose the United States had converted one of its war vessels into a merchant vessel and leased the same to plaintiff for a period of five years, with the right to retake possession of the same before the expiration of the contract period if the exigency of war required it? Would the United States, in the event of plaintiff's refusal to return said vessel before the expiration of the contract period, be required to proceed through the courts and to show to the satisfaction of the Court that the exigency of an impending war required the return of such vessel before it would rightfully acquire possession thereof? We think not.

I

Due processes of law

Much has been stated in the various briefs filed by petitioner and in oral arguments to the effect that the seizure of the boats deprived the petitioner of his property without due process of law.

If the contract had given no right to retake the boats there might be something to this contention, but the authority which gave to the petitioner whatever rights he obtained reserved the power to terminate his rights under certain conditions. The

declaration of forfeiture and the taking of the boats was the result of this reservation.

We contend that the evidence amply justifies the forfeiture and seizure for actual legal cause, to wit, nonuse. However, be that as it may, the power of determination with respect to that matter resided in the executive official of the Government and his determination of that mixed question of law and fact is, in our opinion, conclusive upon all persons, and undoubtedly so in the absence of fraud or bad faith, which is not shown.

It makes no difference which of the executives had the power to make the finding resulting in forfeiture. Both the executive head of the department and his subordinate made the finding.

Colonel Ashburn simply executed the orders of his superior officer, and in our view the minor executive officer, in his proper sphere of action, exercises the plenary power of the executive department, and is no more subject to the restraints of judicial process than the executive head of the department.

Where the executive power has pronounced its finding or judgment within its proper sphere of action, a judicial judgment is not necessary to the enforcement of the executive one, for the reason that all the compulsive power of the Government is in the Executive Department and may be exercised by it in execution of its own processes and judgment, just as it is exercised by it in the execution of judicial processes and judgment.

Lacking the necessity for judicial confirmation of an executive finding, there is certainly no necessity or reason for an appeal to the judiciary for the execution of the executive finding, for the execution of process, judicial or otherwise, is an executive function.

Due process of law is not necessarily judicial in its nature. Whatever is done by a duly constituted authority in its proper sphere of action is due process of law. (*Meyer* v. *Peabody,* 212 U. S. 78, 84; *U. S.* v. *Ju Toy,* 198 U. S. 253, 263.)

Government acting in a commercial capacity

It has been contended that in making the lease the Government was acting in a commercial and not in a sovereign capacity. In *North American Com. Co.* v. *U. S.,* 171 U. S. 110, an action to recover rent under a lease of seal fisheries, the same claim was made. The Court said:

> The seal fisheries of the Pribilof Islands were a branch of commerce, and their regulation involved the exercise of power as a sovereign, and not as a mere proprietor.

But even if the United States were acting in a commercial capacity, the result would not be different.

It may be true that when the United States enters into a commercial transaction its liability in connection therewith is to be determined in accordance with the rules of substantive law which apply in the case of individuals. But the immunity of the

United States from being sued without its consent applies as well to suits to enforce that liability as to any other suits. (*U. S.* v. *Bank of The Metropolis,* 15 Pet. 392.)

The creation of the Court of Claims with jurisdiction to determine contract claims against the United States is evidence that the United States could not otherwise be sued upon commercial transactions, as most, if not all, contract claims must arise from commercial rather than governmental transactions.

We believe that no case gives support to the proposition that the determination of the question whether a suit against officers of the United States is really one against the United States is dependent upon whether the transaction involved is a commercial or governmental one. *Sloan Shipyards* v. *U. S. Fleet Corp.,* 238 U. S. 549, is certainly no such authority.

In the case of *Bank of United States* v. *Planters Bank of Georgia,* 9 Wheat. 904, it was simply decided that because the State happened to be a stockholder in the bank did not confer immunity from suit upon the bank. Of course, the stockholders of a corporation legally have no identity with the corporation itself.

In our view, whether the leasing of these boats was a commercial transaction or not, it certainly arose out of the exercise of sovereignty. The fleet had been constructed for the purpose of carrying

on war, which is one of the highest acts of sovereignty. One of the purposes of the Government is to promote commerce. This contract was entered into so that these otherwise useless instrumentalities might be of service to the public and aid in the development of one of the great waterways of the nation.

Petitioner has appended to his brief the opinion of District Judge Faris on the motion to dismiss the bill, in which he holds that indirectly this suit is one against the Fleet Corporation, for the reason that the money used to construct the boats and barges was primarily from money allotted by Congress to the Fleet Corporation. This contention is obviously without merit. The contract under which these boats were leased was made with the United States and recites that the United States is both the lessor and the owner thereof. It is a fundamental rule of law that a lessee can not dispute the title of the lessor. Furthermore, the money used for the construction of these boats was the property of the United States, and not of the Fleet Corporation. In fact, all of the money and property of the Fleet Corporation belonged to the United States and was merely held by the Fleet Corporation as agent for the United States for the construction of ships, shipyards, etc. This is manifest from a cursory examination of the Acts of Congress.

By the terms of the Shipping Act, approved September 7, 1916 (Comp. Stat. 8146b), the United States Shipping Board was created, to be composed of five commissioners appointed by the President. Under this Act the Shipping Board, with the President's approval, was authorized to construct and equip vessels for naval or military purposes. Under Section 11 (Comp. Stat. 8146b), the Shipping Board was authorized to form a corporation under the laws of the District of Columbia for the construction of merchant vessels in the commerce of the United States and on behalf of the United States. In accordance with the provisions of that section the United States Shipping Board Fleet Corporation was incorporated on April 17, 1917.

Under the Urgent Deficiencies Appropriation Act of June 15, 1917, c. 29, the President was authorized and empowered to place an order with any person for such ships and material as the necessities of the Government, to be determined by the President, should require during the period of the war. Under Section 4 of that Act, the President was given the power and authority to expend the sum appropriated, through such agency or agencies as he might determine from time to time. Under Section 12 of the same Act there was appropriated for the purposes as aforesaid the sum of $250,000,000.

By an Executive order of July 11, 1917, the President, under the authority of Section 4 of the

Act of June 15, 1917, as aforesaid, directed that the United States Emergency Fleet Corporation should have and exercise all of the authority and power vested in him in the "emergency shipping fund," in so far as applicable to and in furtherance of the construction of vessels.

It is manifest, therefore, and the authorities so hold, that the Emergency Fleet Corporation was but the agency designated by the President for carrying out the powers conferred upon him in the construction of such ships and vessels as would be needed by the naval and military departments during the period of the war. While it is true that all contracts made by the Fleet Corporation for the construction of boats and vessels were contracts of that corporation and not of the United States, nevertheless, the money appropriated to the Fleet Corporation was the money of the United States and the vessels so purchased or constructed were the property of the United States and not of the Fleet Corporation. (*United States* v. *Carlin,* 259 Fed. 904; *United States* v. *Union Timber Products Co.,* 259 Fed. 907; *United States* v. *Walter,* 263 U. S. 15.)

Furthermore, the President, by Executive order dated March 12, 1919, withdrew from the United States Shipping Board Emergency Fleet Corporation that part of the power and authority vested in him by law with respect to the barges and towboats here in controversy and conferred the same

upon the Secretary of War " to be by him executed through contract or otherwise as in his judgment may be most economical and advantageous to the United States."

In the Transportation Act of 1920, Title 11, Section 201 (d), it is provided:

> Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis.

The facilities so designated are the boats and barges here in controversy.

It is quite clear, therefore, that the Fleet Corporation had no interest or concern in the boats and barges in question and that the Secretary of War, by virtue of the Executive order above referred to, had full and complete control, on behalf of the United States, of the construction, use, and disposition of such boats and barges.

All of the cases cited by petitioner are readily distinguishable from the case here. No one will deny that an executive officer charged with a duty simply ministerial may not be compelled by mandamus to perform his duty. Neither will any one contend that an executive officer who oversteps the

authority of his office to the injury of the citizen may not be restrained from so doing. Nor will it be contended that an executive officer may, without authority of law, take the property of the citizen and appropriate it to the uses of the Government. If he undertakes so to do, the Courts have undoubted authority to restrain him.

United States v. *Lee*, 106 U. S. 196, is very much relied upon by petitioner and was very much quoted by the District Court. The nub of that decision is stated on page 219, as follows:

> What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.
>
> It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it

may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislature, to deprive any one of life, liberty, or property without due process of law or to take private property without just compensation.

This is no such case.

Respectfully submitted.

LON O. HOCKER,

Special Assistant to the Attorney General.

ST. LOUIS, *April, 1926.*